

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JOSE F. ANDRADE MUNOZ,)	No. CV 11-05094-VBK
)	
Plaintiff,)	MEMORANDUM OPINION
)	AND ORDER
v.)	
)	(Social Security Case)
MICHAEL J. ASTRUE,)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	
_____)	

This matter is before the Court for review of the decision by the Commissioner of Social Security denying Plaintiff's application for disability benefits. Pursuant to 28 U.S.C. §636(c), the parties have consented that the case may be handled by the Magistrate Judge. The action arises under 42 U.S.C. §405(g), which authorizes the Court to enter judgment upon the pleadings and transcript of the Administrative Record ("AR") before the Commissioner. The parties have filed the Joint Stipulation ("JS"), and the Commissioner has filed the certified AR.

Plaintiff raises the following issues:

- Whether the Administrative Law Judge ("ALJ") properly considered the medical evidence of record; and

1 regard there are rules of interpretation which have been set out by
2 the Ninth Circuit. The proverbial "godfather" of these opinions is
3 Lester v. Chater, 81 F.3d 821 (9th Cir. 1995). That opinion sets out
4 a hierarchy of medical sources, beginning with the proposition that
5 the greatest weight is given to treating physicians, then examining
6 physicians, then non-examining physicians. (Id. at 830.) Lester goes
7 further, however, in instructing how an ALJ is to assess contradictory
8 opinions of physicians who may be on an equal level, such as opinions
9 of examining physicians. Here, Lester requires that an opinion of an
10 examining doctor, if contradicted by another doctor, "can only be
11 rejected for specific and legitimate reasons that are supported by
12 substantial evidence in the record." Id., citing Andrews v. Shalala,
13 53 F.3d 1035, 1043 (9th Cir. 1995).

14 In a case where examining physicians render contradictory
15 opinions on material issues such as lifting capacity, postural
16 limitations, etc., it would be difficult to conceive of a case in
17 which an ALJ would not even mention an opinion of an examining
18 physician, yet adopt the contrary opinion of another physician.
19 Theoretically, it might be possible that even without mentioning the
20 opinion of the "rejected" physician, a decision might contain analysis
21 which could constitute specific and legitimate reasons to reject that
22 opinion. This is a difficult proposition, however, and one which an
23 ALJ might pursue with the risk that his or her analysis will be later
24 rejected when reviewed, for example, in a District Court case.
25 Indeed, that is exactly the case here.

26 In discussing his first issue, Plaintiff outlines opinions of
27 various treating, examining and non-examining physicians which were
28 not even mentioned in the ALJ's decision. (See AR at 19-30.) These

1 include the opinions of Dr. Greenspan, who treated Plaintiff, and
2 rendered an opinion on December 5, 2006 (JS at 5, AR 197-237; 257-295;
3 556-652); Dr. Fabella, who performed a medical evaluation on July 19,
4 2006 at the request of the Department of Social Services (JS at 6, AR
5 526-531); Dr. Danufsky, who conducted the State Agency review (AR 533-
6 538); and Dr. Akmakjian, who did a WC Agreed Medical Evaluation
7 ("AME") on December 21, 2006 (AR 886-894). Finally, there is the
8 opinion of Dr. Moazzaz, who performed an examination on September 27,
9 2008 at the request of the Department of Social Services. (AR 1009-
10 1013.) Of these opinions, the ALJ only discussed that of Dr. Moazzaz
11 (AR 25), and in addition relied upon examining physician Dr. Guevarra,
12 who examined Plaintiff in February 2009. (AR 25, 1187-1209.)

13 In defending the ALJ's failure to mention, much less assess, any
14 of the conclusions of the above-named physicians (with the exception
15 of Dr. Moazzaz), the Commissioner takes contradictory positions.
16 First, the Commissioner cites law that the ALJ is not required to
17 discuss evidence that is neither significant nor probative (JS at 9,
18 citing Howard ex rel. Wolff v. Barnhart, 341 F.3d 1006, 1010 (9th Cir.
19 2003)). This will hardly do, in that it is difficult to visualize a
20 scenario in which a physician's assessment of a person's functional
21 capacities and postural limitations is not significant or probative
22 evidence. Indeed, after devoting scant space to this argument, the
23 Commissioner then makes a second argument, which is that, at least
24 with regard to Dr. Greenspan, the ALJ in fact did not reject that
25 physician's functional limitations. (See AR at 9-10.) With regard to
26 the rest of Dr. Greenspan's opinion, the Commissioner substantiates
27 its implicit discounting by the ALJ by arguing that Dr. Greenspan's
28 opinions were based strictly upon subjective factors relating to

1 disability, and since the ALJ rejected Plaintiff's credibility, that
2 would support the implicit rejection of the rest of Dr. Greenspan's
3 opinion. (AR at 10.) This argument simply does not hold water. What
4 the Commissioner is referencing with regard to subjective elements of
5 Dr. Greenspan's analysis, as that term is used, largely concerns an
6 assessment of Plaintiff's pain, which is always a subjective factor,
7 but one which a physician may assess based upon objective evidence.

8 Aside from these brief and isolated references to Dr. Greenspan's
9 opinion, the Commissioner glosses over the question of whether the
10 ALJ's opinion contains specific and legitimate reasons to reject all
11 the other opinions. As the Court has rejected the Commissioner's
12 contention that these opinions do not constitute significant and
13 probative evidence, there is little else to support the ALJ's
14 decision.

15 What the Court is left with, then, is the ALJ's decision which
16 adopts the conclusions of certain physicians, but ignores the
17 conclusions of other physicians on a similar level in the hierarchy,
18 without discussing them. There is no basis upon which the Court can
19 analyze whether the ALJ's silent rejection of these unmentioned
20 physicians' opinions is supported by specific and legitimate evidence.
21 The case must remanded so that this analysis can proceed according to
22 settled principles.

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25 ON REMAND, PLAINTIFF'S CREDIBILITY WILL BE EVALUATED DE NOVO

26 A substantial part of the JS is devoted to Plaintiff's complaint
27 that the ALJ improperly rejected his credibility regarding subjective
28 pain. The Court need not delve into this fully, for several reasons.

1 First, the Court's determination with regard to the first issue may
2 have a substantial effect on the credibility determination. For
3 example, the Court has mandated that the ALJ review and discuss the
4 opinions of various physicians who are unmentioned in the current
5 decision. The opinions of those physicians in part concern
6 Plaintiff's pain and his functional abilities as related to that pain.
7 As the Court has determined, the ALJ implicitly rejected these
8 opinions without providing specific and legitimate reasons. On
9 remand, it may be that the ALJ will find to be credible some of those
10 opinions. If the ALJ credits certain physician opinions with regard
11 to Plaintiff's pain, logically, that might affect the ALJ's
12 determination of the credibility of Plaintiff's own testimony.

13 The Court will however, make certain observations which will be
14 followed in the de novo review. First, this Court does not accept,
15 per se, a rejection of an individual's credibility because of an
16 alleged pecuniary interest in the individual's own case, as a
17 secondary gain motivation. (See Decision, AR at 27.) This Plaintiff,
18 as with any other plaintiff, has applied for benefits in order to
19 obtain them. By definition, that is a pecuniary interest. Plaintiffs
20 of course have an interest in getting benefits. But, in and of
21 itself, that does not constitute a relevant factor in a proper
22 credibility assessment. For example, if there were evidence that a
23 plaintiff had made a statement to the effect, "I'm not disabled, but
24 I'm going to apply for benefits because I need the money," that
25 clearly would constitute a basis to impeach credibility based upon
26 improper pecuniary motivation. In any event, as articulated in the
27 current Decision, the pecuniary interest factor does not constitute a
28 proper basis for the credibility assessment.

1 In addition, if there is to be a citation to such things as
2 inconsistent or contradictory statements, they must be specifically
3 identified in the decision, not in a post hoc discussion, such as the
4 Commissioner provides in his portion of the JS. In addition, since
5 Plaintiff will be afforded a new hearing, he will have the
6 opportunity, if he chooses, to explain issues which led to unfavorable
7 credibility conclusions by the ALJ.

8 This matter will be remanded for further hearing on a de novo
9 basis in accordance with this Memorandum Opinion.

10 **IT IS SO ORDERED.**

11
12 DATED: June 7, 2012

13 /s/
VICTOR B. KENTON
UNITED STATES MAGISTRATE JUDGE